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IN THE

Supreme Court of the United States

OCTOBER TERM, 1972

No. 72-1040

COMMUNIST PARTY OF INDIANA, GUS HALL, JARVIS TYNER, SIMON BOORDA, JESSE REECE, MIKE BAYER, and RUTH NORRICK, individually and on behalf of all other qualified voters similarly situated,

Appellants,

—v.—

EDGAR D. WHITCOMB, individually and as Governor of the State of Indiana; KARL J. STIPHER and THURMAN DEMOSS, individually and as members of the Indiana State Election Board; and the INDIANA STATE ELECTION BOARD,

Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF INDIANA, HAMMOND DIVISION

BRIEF OF APPELLANTS

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EDGAR D. WHITCOMB, individually and as Governor of the State of Indiana; KARL J. STIPHER and THURMAN DEMOSS, individually and as members of the Indiana State Election Board; and the INDIANA STATE ELECTION BOARD,

Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF INDIANA, HAMMOND DIVISION

BRIEF OF APPELLANTS

Jurisdiction

This suit was brought pursuant to 42 U.S.C. §1983 and U.S. Const. Art. I, §10; Art. II, §1; Art. VI, Clause 2; Amendment I and Amendment XIV. Jurisdiction was based on the above provisions and on 28 U.S.C. §§1331,

1343, 2201, 2202, 2281, and 2284. The three-judge district court was asked to declare invalid and enjoin enforcement of Ind. Ann. Stat. §29-3812. The Memorandum and Order of the three-judge court was entered on September 28, 1972; appellees' Verified Motion to Reconsider and to Stay and appellants' Petition for Mandate to Enforce the Prior Order of the Court were denied on October 4, 1972; appellants' Motion to Amend was denied on October 31, 1972; and appellants' Notice of Appeal was filed in the district court on November 29, 1972.[1] The Jurisdictional Statement was filed on January 26, 1973. On March 19, 1973 consideration of the question of jurisdiction was postponed to the hearing on the merits. The jurisdiction of this Court is invoked under 28 U.S.C. §1253. Cases supporting jurisdiction include *Socialist Labor Party* v. *Gilligan,* 406 U.S. 583 (1972).

Opinions and Orders

The memorandum and orders of the three-judge district court are unreported. They are set out in the Appendix to the Jurisdictional Statement at pp. 1a-6a.[2] Decisions on Applications to this Court for stays are reported at 93 S. Ct. 16 and 93 S. Ct. 28.

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[1] Appellees in the instant case filed a Jurisdictional Statement also appealing the decision below on January 13, 1973. This Court summarily affirmed the portion of the district court decision thus appealed from in *Whitcomb* v. *Communist Party of Indiana,* 36 L. Ed.2d 173 (1973).

[2] References to the Appendix are abbreviated App. pp. ——; references to the Jurisdictional Statement are abbreviated J.S. pp. ——; references to the Record are abbreviated R. pp. ——; references to the Appendix to this brief are abbreviated pp. ——, *infra.*

Statute Involved

The statute in controversy in this case is Ind. Ann. Stat. §29-3812 which reads as follows:

> 29-3812. *Elections—Ballots—Certain political parties barred—Doctrine and purpose of party—Investigation.* —No political party or organization shall be recognized and given a place on or have the names of its candidates printed on the ballot used at any election which advocates the overthrow, by force or violence, of the local, state or national government, or which advocates, or carries on, a program of sedition or of treason, and which is affiliated or cooperates with or has any relation with any foreign government, or any political party or group of individuals of any foreign government. Any political party or organization which is in existence at the time of the passage of this act (chs. 28-60 of this title), or which shall have had a ticket on the ballot one or more times prior to any election, and which does not advocate any of the doctrines the advocacy of which is prohibited by this act, shall insert a plank in its platform that it does not advocate any of the doctrines prohibited by this act. No existing or newly-organized political party or organization shall be permitted on or to have the names of its candidates printed on the ballot used at any election until it has filed an affidavit, by its officers, under oath, that it does not advocate the overthrow of local, state or national government by force or violence, and that it is not affiliated with and does not cooperate with nor has any relation with any foreign government, or any political party, organization or group of individuals of any

foreign government. The affidavit herein provided for shall be filed with the state election board or the county election board having charge of the printing of the ballot on which such ticket is to appear. The election board with which such affidavit is filed shall make, or cause to be made such investigation as it may deem necessary to determine the character and nature of the political doctrines of such existing or proposed new party and the expense of such investigation by the state election board shall be paid out of the general funds of the state treasury not otherwise appropriated, provided the amount of such appropriation shall not exceed five hundred dollars ($500); and the expense of the investigation by the county election board shall be paid out of the funds in the treasury, not otherwise appropriated, provided the amount of such appropriation shall not exceed three hundred dollars ($300), and if the board is of the opinion that such existing or proposed new party advocates doctrines which are in violation of the provisions of this act (chs. 28-60 of this title), or that any of the statements in said affidavit are false, the board shall not permit such ticket or candidates on the ballot.

Questions Presented

1. Whether the appeal in this case was timely filed.

2. Whether the United States Constitution precludes the States from conditioning access to the ballot upon the making of any kind of loyalty oath.

3. Whether the United States Constitution precludes the States from conditioning access to the ballot in a presidential and vice presidential election upon the making of an oath in any way different from the oath of office prescribed in Article II, §1, or in any other election upon the making of an oath that exceeds the oath "to support this Constitution" directed in Article VI, cl. 3.

4. Whether a state statute that conditions access to the ballot upon a political party's making an oath "that it does not advocate the overthrow of local, state or national government by force or violence" is unconstitutionally broad and vague under the First and Fourteenth Amendments.

5. Whether the Communist Control Act of 1954 unconstitutionally requires or permits the State of Indiana to condition access to the ballot on a political party's making an oath "that it does not advocate the overthrow of local, state or national government by force or violence."

Statement of the Case

This is an appeal from a decision of a three-judge federal district court that upheld a part of an Indiana statute requiring a political party to file a "loyalty oath" as a condition precedent to placing any of its candidates on any public election ballot. As a result of that decision, the appellants were barred from participating in the November 1972 presidential election. They seek review of the decision below in order to guarantee their future exercise of their constitutional rights.

The appellants are the Communist Party of Indiana, a new political party in Indiana seeking a position on the Indiana Ballot; Gus Hall and Jarvis Tyner, the Party's candidates in 1972 for President and Vice President of the United States, respectively, who intend to seek office in the future; Simon Boorda, Jesse Reece, and Mike Bayer, officers of the Communist Party of Indiana who desire that the Party appear on the Indiana Ballot in future local, state and federal elections; and Ruth Norrick, a registered voter in Lake County, Indiana, who, on behalf of all qualified voters similarly situated, desires that the Party and its candidates be placed upon the Indiana Ballot in future elections, in order that she and the class she represents may be able to vote for such candidates. The appellees are Edgar D. Whitcomb, Karl J. Stipher and Thurman DeMoss, individually and together as the Indiana State Election Board. The appellees, acting on behalf of the State Election Board must certify all new political parties before they may be placed upon the Indiana Ballot. (App. pp. 10a-13a, 18a-19a, 26a-27a.)

Ind. Ann. Stat. §29-3812 requires a newly-organized political party, as a condition for placing its candidates on the ballot, to file an affidavit

> under oath, that it does not advocate the overthrow of local, state, or national government by force or violence, and that it is not affiliated with and does not cooperate with nor has any relation with any foreign government, or any political party, organization or group of individuals of any foreign government.

The Communist Party of Indiana presented valid petitions for inclusion on the Indiana ballot, but was denied a place on the ballot by the Indiana State Election Board for failure to submit the required affidavit. The Election Board relied on the words of the statute and on Official Opinion No. 11 of the Indiana Attorney General, dated August 28, 1972, and prepared especially to analyze the statutory requirement in light of the Communist Party's expected submission of petitions.[3] Because of their belief that the affidavit requirement was unconstitutional the appellants filed suit in the United States District Court for the Northern District of Indiana, requesting the convening of a three-judge court, the issuance of an injunction, and a declaratory order that Ind. Ann. Stat. §29-3812 was unconstitutional. (The amended complaint is found at App. pp. 10a-20a.)

On September 28, 1972, a three-judge court conducted a hearing. At this hearing actions were also heard involving the American Independent Party and the Indiana Peace and Freedom Party, which had also been refused certifica-

[3] App. p. 22a. The Opinion of the Attorney General is set out at J.S. pp. 9a-19a.

tion because they filed "improper" disclaimer affidavits. The Memorandum and Order handed down that same day stated in part:

> We have concluded that the loyalty oath, so-called, contained in Ind. Ann. Stat. 29-3812 is severable and that, as so separated, the first portion is constitutional and the second segment is unconstitutional. That is, that portion of the statute providing "that it does not advocate the overthrow of local, state or national government by force or violence," is constitutional and hence enforceable by Indiana. That portion of the statute and oath providing "and that it is not affiliated with and does not cooperate with or [sic] have any relations [sic] with any foreign government or any political party, organization or group or individual [sic] of any foreign government" is unconstitutional as vague and overbroad and therefore unconstitutional under the First and Fourteenth Amendments to the United States Constitution, and hence may not be required. (J.S. pp. 2a-3a.)

The district court directed the Indiana State Election Board to accept affidavits from the three organizations if their form complied with the court's decision.

Thereafter the affidavits of the Indiana Peace and Freedom Party and the Indiana American Independent Party were accepted and these parties were placed on the ballot. The Communist Party, under continued protest that the Indiana statute was unconstitutional on its face, made an effort to comply with the court's opinion to assure itself and its candidates a ballot position in 1972.

Because the appellant party is at the very least constitutionally entitled to engage in advocacy of overthrow of

government that is not related to imminent action, and because Official Opinion No. 11 of the State Attorney General stated that it "would be an obvious perjury" if the officers of the Communist Party should sign an affidavit pursuant to Ind. Ann. Stat. §29-3812 (J.S. p. 19a), the officers of the Communist Party submitted an affidavit that the Party does not:

> . . . advocate the overthrow of local, state or national government by force or violence. The term advocate as used herein has the meaning given it by the Supreme Court of the United States in *Yates* v. *United States*, 354 U.S. 298 at 320, "the advocacy and teaching of concrete action for the forcible overthrow of the government, and not of principles divorced from action." (App. p. 34a.)

This affidavit was submitted on September 29, 1972 at which time the Election Board by a two-to-one vote refused to certify the Communist Party on the ballot for the November, 1972 election. The reasoning of the appellees, as expressed to the appellants at this session, was that the term "advocate," as required by Ind. Ann. Stat. §29-3812, includes the advocacy and teaching of abstract ideas, beliefs, and principles divorced from action. (App. pp. 31a-32a.)

On October 3, 1972 the appellants filed in district court a Petition for Mandate to Enforce the Prior Order of the Court (App. pp. 31a-35a). Also on October 3rd, the appellees filed a Verified Motion to Reconsider and for Stay, presumably pursuant to Rules 52(b) and 59 of the Federal Rules of Civil Procedure (pp. 1a-3a, *infra*). On October 4, 1972 the district court denied the appellants' Petition and dismissed the appellees' Motion (J.S. p. 5a).

On October 10, 1972 the appellants, pursuant to Rules 52(b) and 59(e) of the Federal Rules of Civil Procedure, filed a Motion to Amend in the district court (App. pp. 36a-37a). Simultaneously, pursuant to 28 U.S.C. §1253, the appellants filed a Notice of Appeal from that portion of the district court opinion upholding part of Ind. Ann. Stat. §29-3812 as constitutional (App. p. 38a).

On October 17, 1972 the appellants filed a Motion to Withdraw Notice of Appeal (App. pp. 39a-40a) "until such time as this court acts upon plaintiffs' Motion to Amend filed with this court on October 10, 1972." On October 31, 1972 the district court granted the appellants' Motion to Withdraw Notice of Appeal and denied its Motion to Amend (J.S. p. 6a).

On November 16, 1972, pursuant to 28 U.S.C. §1253, the appellees filed a notice of appeal from that portion of the district court opinion finding a part of Ind. Ann. Stat. §29-3812 unconstitutional (R. pp. 132-135). In that appeal the decision below was summarily affirmed. *Whitcomb* v. *Communist Party of Indiana,* 36 L. Ed.2d 173 (1973).

On November 29, 1972 the appellants filed a notice of appeal from that portion of the District Court upholding the constitutionality of a part of Ind. Ann. Stat. §29-3812 (J.S. p. 7a).[4]

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[4] Both sides also had attempted to secure emergency relief from this Court.

On September 29, 1972 the appellees filed a motion entitled "Emergency Application for Stay of Order of the United States District Court for the Northern District of Indiana, Hammond Division," No. A-370. It sought relief based on a challenge, rejected by the district court, to the validity of the petitions filed with the Election Board.

On October 4, 1972 the appellants filed a Cross Motion to Petition for Mandate to Enforce the Prior Order of the United States

Summary of Argument

This case is now properly before the Court. Because the relief originally sought included placing the Communist Party's candidates on the November 1972 Indiana ballot, this case has been characterized by procedural steps on both sides made under the pressure of approaching deadlines.

Various motions made after the original entry of the district court's Memorandum and Order of September 28, 1972 seemed straightforward and correct when made. Now, however, the appellees claim that actions both by the appellants and the district court were incorrect, with the result that Notice of Appeal was in actuality filed two days late. But analyzing the question in any of several ways, demonstrates that this appeal was timely filed and that the Court has jurisdiction. It is clear that various motions on both sides destroyed the finality of the September 28th judgment and lengthened the time for appeal.

The Communist Party's right of access to the Indiana ballot is a right indisputably protected by the First Amendment, as is the correlative right of the appellant candidates. *Williams* v. *Rhodes,* 393 U.S. 23 (1968). The First Amendment's protection indisputably extends as well to the individual voter-appellants. *Reynolds* v. *Sims,* 377 U.S.

District Court. Its purpose was similar to the Petition for Mandate to Enforce the Prior Order of the Court filed in the district court, set out at App. pp. 31a-35a.

The appellees' Petition and appellants' Cross Motion were denied by this Court on October 5, 1972, 93 S. Ct. 28.

On October 6, 1972 the appellants filed an Emergency Application for Stay of Order of the United States District Court for the Northern District of Indiana, Hammond Division, No. A-378. This is described by Mr. Justice Rehnquist in his opinion accompanying his denial of the motion that same day, 93 S. Ct. 16.

533 (1964). Nothing in the Constitution (which speaks of oaths of office, not candidacy oaths) or in logic justifies the substantive restriction on basic First Amendment rights presented by the Indiana political party loyalty oath.

If any oath can validly be applied to candidacy for federal offices, such oath can be no broader than that required by the United States Constitution. It is firmly established that the Constitution's enumerated qualifications for federal offices are exclusive, beyond the power of the state to add to or subtract from. The additional qualification, imposed by Indiana in the form of a candidacy oath, cannot stand.

The Indiana oath is also violative of the First and Fourteenth Amendments because it is unconstitutionally vague and overbroad. The vagueness of this negative oath is evident on its face as there is no clarification of the crucial word "advocacy". This litigation, however, has served to clarify the statute and it now appears that Indiana intends the word "advocacy" to include advocacy of abstract doctrine not related to imminent lawless action. Thus construed, the statute conditions fundamental rights on the sacrifice of constitutionally protected advocacy, *Brandenburg* v. *Ohio,* 395 U.S. 444 (1969). Since this Court must accept the Indiana interpretation of the law, the statute cannot be saved by "rewriting," and must fall as unconstitutional.

Finally, it is clear that the Communist Control Act of 1954 cannot justify the Indiana statute or serve as an impediment to the Communist Party's attack on the statute. It has not been shown that the Communist Control Act is even applicable to the instant case. Furthermore, there is enough evidence from various court opinions to indicate that the Communist Control Act is unconstitutional.

ARGUMENT

I.

The appeal was timely filed.

The appellees contend that this appeal is not timely because a notice of appeal was not filed by the appellants "within sixty days of the entry of the District Court's Memorandum and Order of September 28, 1972." (Motion to Affirm or Dismiss, p. 4.) They are completely mistaken.

The appellees' mistake probably results from confusion about the multiplicity of proceedings that followed the district court hearing and decision of September 28, 1972. From its inception, this case has been shaped by the various deadlines and time considerations that characterize elections. The appellants' procedural steps were taken for the primary purpose of securing the Communist Party and its candidates positions on the ballot for the November, 1972 presidential election. The appellees' actions were taken for just the opposite purpose. Both sides requested reconsideration or amendment of the judgment; both sides appealed for and were denied emergency relief from both this Court and the district court; both sides appealed the district court's judgment to this Court.

In view of the multiplicity of proceedings, the appellees' confusion about the timeliness of this appeal is understandable. A clear recitation of the proceedings, however, should dispel it.

(1) *September 28, 1972*: The district court's Memorandum and Order was filed.

(2) *October 3, 1972*: The appellants filed a timely Petition for Mandate to Enforce the Prior Order of the Court (App. pp. 31a-35a), and the appellees filed a timely Verified Motion to Reconsider and for Stay (pp. 1a-3a, *infra*). The appellees' Motion clearly was a Motion for Amendment or New Trial under Rules 52(b) and 59 of the Federal Rules of Civil Procedure. It specifically requested the district court "to reconsider its ruling . . . and in the alternative . . . to clarify its said ruling. . . . " (pp. 1a-3a, *infra*).

(3) *October 4, 1972*: The district court denied appellants' Petition and dismissed appellees' Motion (J.S. p. 5a).

(4) *October 10, 1972*: Simultaneously, as appears from the time of the filing stamps (R. pp. 111, 119), the appellants filed a Motion to Amend, pursuant to Rules 52(b) and 59(e) of the Federal Rules of Civil Procedure, and a Notice of Appeal. At the time of filing the Notice of Appeal, the appellants were hoping to obtain emergency relief from this Court to place their candidates on the Indiana ballot for the November 1972 election. Subsequent research convinced the appellants that no emergency relief was available from this Court and the purpose of filing the Notice of Appeal in order to vest jurisdiction in this Court was thus obviated. (App. pp. 39a-40a.)

(5) *October 17, 1972*: The appellants filed a Motion to Withdraw Notice of Appeal in the district court, pursuant to Supreme Court Rule 14(1) which allows the lower court to "dismiss the appeal upon motion and notice by the appellant." The Motion specifically requested leave to withdraw the "Notice of Appeal until such time as this court acts upon plaintiffs' Motion to Amend . . . [and] so that it will not pose a bar to this court acting upon the Motion to Amend filed on October 10, 1972." (App. pp. 39a-40a.)

(6) *October 31, 1972*: The district court granted the appellants' Motion to Withdraw Notice of Appeal and denied their Motion to Amend.

(7) *November 29, 1972*: A new Notice of Appeal was filed by the appellants.

Title 28 U.S.C. §2101 allows 60 days from the date of final judgment to file a Notice of Appeal in a case like the instant one. The filing of a timely Rule 52(b) Motion to Amend or a timely Rule 59 Motion for New Trial destroys the finality of a district court's order, *Leishman* v. *Associated Wholesale Electric Company*, 318 U.S. 203 (1943), and the 60-day period "runs from the date of the order overruling the motion." *United States* v. *Adams*, 383 U.S. 39, 41 n. 1 (1966). See 9 *Moore's Federal Practice* (2d ed.) ¶201.03 [2.-2], pp. 511-3 (1973). Thus, unless the district court's actions were improper, the second Notice of Appeal, clearly filed within sixty days of the denial of the appellees' Verified Motion to Reconsider and the appellants' Motion to Amend, was timely.

The appellees' contention seems to be that the simultaneous filing of the appellants' Motion to Amend and their Notice to Appeal, on October 10th, rendered the Motion to Amend a nullity; therefore the district court's ruling on that motion was a nullity; since there never was a valid Motion to Amend, the sixty day appeal period ran uninterrupted from September 28, 1972. Because appellants' first Notice of Appeal was properly withdrawn on October 31st and their second Notice of Appeal, filed on November 29th, was filed more than sixty days after final judgment, this appeal is not timely. (Motion to Dismiss or Affirm, pp. 4-5.) No case is cited which supports this analysis. In *Fiske* v. *Wallace*, 115 F.2d 1003 (8th Cir. 1940), *cert. denied*, 314 U.S. 663 (1941), cited by the appellees at p. 4

of their Motion to Dismiss or Affirm, the Notice of Appeal was filed two hours before another motion was filed by the opposing party. The circuit court ruled that the trial court had been divested of jurisdiction to consider the subsequent motion. But see *Elgen Manufacturing Corporation* v. *Vertfabrics, Inc.*, 314 F.2d 440 (7th Cir. 1963), reaching an apparently contrary result.

There is no need in this appeal for the Court to resolve the question whether the appellants' simultaneous filing of a Motion to Amend and a Notice of Appeal on October 10, 1972 rendered nullities of both or either of them. Regardless of the answer, the appeal was timely.

There are three possible dates upon which final judgment occurred: September 28, 1972, when the district court rendered its Memorandum and Order (J.S. pp. 1a-4a); October 4, 1972, when the district court dismissed as moot the appellees' timely Verified Motion to Reconsider (J.S. p. 5a); and October 31, 1972, when the district court denied appellants' Motion to Amend (J.S. p. 6a). If this Court were to decide that the date of final judgment were either October 4th or October 31st, the appeal was, of necessity, timely filed and docketed. Even if the date of September 28th were selected, the appeal was timely filed, although it may have been docketed late. However, timely docketing is not jurisdictional, and this Court should entertain the appeal.

If both the Motion and the Notice are nullities, the November 29th Notice of Appeal was timely. No Notice of Appeal was interposed to deny the district court jurisdiction between the date of the initial judgment on September 28th and the district court's October 4th denial of the appellees' timely Verified Motion to Reconsider. The appellees' motion, questioning the correctness of the district

court's judgment, was functionally the equivalent of a Rule 59(e) motion. Therefore the finality of the September 28th judgment was destroyed. See 9 *Moore's Federal Practice* (2d ed.), ¶204.12[1], p. 951 (1973); *Gainey* v. *Brotherhood of Railway & Steamship Clerks*, 303 F.2d 716 (3d Cir. 1962); *Woodham* v. *American Cytoscope Company of Pelham, N.Y.*, 335 F.2d 551 (5th Cir. 1964). At the very earliest, then, October 4th and not September 28th was the date of final judgment, and the November 29th Notice of Appeal was filed within the requisite sixty day period.

If only the October 10th Notice of Appeal is a nullity, the October 10th Motion to Amend certainly suspends the appeal period. The appellees concede that it was timely made under Rules 52(b) and 59(e) (Motion to Dismiss or Affirm, p. 4). Indeed, it was made just six days after the district court disposed of the appellees' timely Verified Motion to Reconsider. And regardless of whether the date of final judgment is taken to be October 4th, when the appellees' motion was dismissed, or October 31st, when the appellants' motion was denied, the November 29th Notice of Appeal was timely.

If both the Motion and the Notice are viable, no difficulty at all is encountered. Supreme Court Rule 14(1) permitted the appellants to make the October 17th Motion to Withdraw Notice of Appeal and the district court to grant that motion on October 31st. And whether the date of final judgment is taken to be October 4th or October 31st, the November 29th Notice of Appeal again was timely.

The same happy result occurs if only the October 10th Notice of Appeal is viable and the Motion to Amend is not. The Notice was still probably vitiated by the district

court's granting of the Motion to Withdraw Notice of Appeal on October 31st. It is also possible that the October 10th Motion to Amend was resurrected by the October 17th Motion to Withdraw the Notice of Appeal, which specifically was predicated upon the appellants' expectation that they had filed a viable Motion to Amend (App. pp. 39a-40a). The date of final judgment would then be October 31st. If the October 10th Motion remained a nullity, the date of final judgment was October 4th. The November 29th Notice of Appeal was timely in either event.

Thus, as long as it is clear that the district court's denial of appellees' timely Verified Motion to Reconsider postponed the date of final judgment to a date no earlier than October 4th, it is unnecessary for this Court to pass upon the effect of appellants' simultaneous filing on October 10th of the Motion to Amend and the first Notice of Appeal. But even if the Court were to conclude that the action on the appellees' Verified Motion to Reconsider did not postpone the date of final judgment, this appeal would still be timely. The better authority indicates that question should be answered in a way that sustains this Court's jurisdiction.

First, the Motion to Amend should be found to be viable. The district court should be taken to have made the assumption that the Motion to Amend was filed first. Therefore, the appellants' first Notice of Appeal was prematurely filed and ineffective to nullify the Motion to Amend. See *United States* v. *Crescent Amusement Co.*, 323 U.S. 173, 177 (1944), *rehearing denied*, 323 U.S. 818 (1945), holding that an appeal, while substantive motions to amend the judgment are pending, is premature and therefore null.

In the absence of a showing to the contrary, the presumption is that the trial court is aware of the law and acted accordingly. "Error is not to be presumed but must be affirmatively shown." 7 *Moore's Federal Practice* (2d ed.), ¶61.11, pp. 61-43 to 61-44 (1972). And when the district court eventually denied the Motion to Amend it gave no indication that the Motion itself was improper or that the court lacked jurisdiction. Under this approach, the final judgment, of course, was entered on October 31st.

Second, even if it were decided that the district court had no power to consider appellants' Motion to Amend, it does not follow that its action was ineffective to extend the time period for filing the Notice of Appeal. This point has been made in several decisions of this Court involving the time for appealing from the district courts to the courts of appeals. In *Bowman* v. *Loperena,* 311 U.S. 262 (1940), this Court ruled that untimely (therefore improper) motions, if entertained by the trial court, lengthened the time period for appeal.

> The filing of an untimely petition for rehearing which is not entertained or considered on its merits, or a motion for leave to file such a petition out of time, if not acted on or if denied by the trial court, cannot operate to extend the time for appeal. But where the court allows the filing and, after considering the merits, denies the petition, the judgment of the court as originally entered does not become final until such denial, and the time for appeal was from the date thereof. 311 U.S. at 266.

Also instructive are the cases of *Thompson* v. *Immigration & Naturalization Service,* 375 U.S. 384 (1964) and *Wolf-*

sohn v. *Hankin*, 376 U.S. 203 (1964). These cases have been explained in the treatises:

> But it must be stressed that *Thompson* and *Wolfsohn* hold only that if, at a time when he may appeal, a party is misled by the words or conduct of the district court into believing that he need not then appeal, he ought not to lose his right to appeal by reason of the mistake of the district court. 9 *Moore's Federal Practice* (2d ed.), ¶204.12[2], p. 958 (1973).

> When employed in the context of an untimely appeal, the unique circumstances concept is based on a theory similar to estoppel. The Supreme Court seems to have concluded that a party ought not be denied an opportunity to appeal because of his failure to file a timely appeal when that failure resulted from reliance on action taken by the district court that generated a reasonable belief that an appeal could be initiated at a later date. 4 Wright & Miller, *Federal Practice and Procedure*, Civil §1168, p. 639 (1969).

See also, *Pierre* v. *Jordan*, 333 F.2d 951 (9th Cir. 1964), *cert. denied*, 379 U.S. 974 (1965); *Motteler* v. *J.A. Jones Construction Company*, 447 F.2d 954 (7th Cir. 1971).

Third, if the Motion to Amend and the district court's ruling denying it were null and ineffective to lengthen the period of appeal, it remains true that the original notice of appeal filed October 10, 1972 was timely, and jurisdiction in this Court was vested as of that date. The Motion to Withdraw Notice of Appeal, filed October 17, 1972, was improper because it was made and treated by the district court under the assumption that the Motion to Amend was still alive. The introductory paragraph of the Motion

to Withdraw states that "plaintiffs . . . request this honorable court for leave to withdraw their Notice of Appeal until such time as this court acts upon plaintiffs' Motion to Amend filed with this court on October 10, 1972 . . ." (App. p. 39a.) Paragraph 6 states: "That therefore plaintiffs desire to withdraw their Notice of Appeal so that it will not pose a bar to this court acting upon the Motion to Amend filed on October 10, 1972." (App. p. 40a.) The district court also assumed the continuing validity of the Motion to Amend. When, on October 31st, it granted the Motion to Withdraw the Notice of Appeal, it also specifically ruled on the Motion to Amend, denying it. (J.S. p. 6a.)

The appellees' argument that the Motion to Amend was void *ab initio* exposes the impropriety of the Motion to Withdraw Notice of Appeal, as well as the district court's impropriety in granting that motion. Hence, if the Motion to Amend was a nullity, both of these subsequent acts should also be treated as nullities. The original October 10th Notice of Appeal should remain in effect.

Under this analysis the Jurisdictional Statement must be taken to have been late in reaching this Court. Supreme Court Rules 13 and 14. Late docketing, however, is not a jurisdictional defect, as the Court made clear in *Johnson* v. *Florida,* 391 U.S. 596, 598 n. (1968) (appeal docketed 56 days late still entertained), and *Pittsburgh Towing Co.* v. *Mississippi Valley Barge Line Co.,* 385 U.S. 32 (1966). In the *Pittsburgh Towing Co.* case, the appeal was timely but docketing was 22 days late. The Court commented on the unsatisfactory explanation for the delay and went on to say:

> This Court has been generous in excusing errors of counsel, but if there are to be rules, there must be some limit to our willingness to overlook their violation. While we are inclined to be generous in exercising our discretion to forgive a mistake and waive the consequences of negligence, fairness to other counsel and to parties with business before the Court as well as due regard for our own procedures leads us to believe that this case does not warrant our indulgence. 385 U.S. at 32-3.

The instant case is a clear example of one meriting the "indulgence" of the Court. If the case was docketed late, the late docketing sprang from misapprehensions by the parties and the lower court. Letting the appellants suffer the harsh results of dismissal would be unfair. Notably, the appellees were aware of the series of motions made by the appellants in this case. The appellees made no jurisdictional or procedural objections at the time the motions were made. Nothing in the record indicates the appellees even felt that any of the district court's actions were procedurally improper when they were made. To this date, the appellees have not shown and cannot show that they have been prejudiced in any way by allegedly improper actions of the district court or by any failure to timely docket this appeal.

The foregoing recital of facts and arguments may make the issue of timeliness appear complex. In reality no such complexities were evident to the parties or the court below. There exists no logical reason why procedural difficulties, real or imagined, should prevent this Court from considering the important constitutional issues which this case presents.

II.

The states may not constitutionally condition access to the ballot on any kind of loyalty oath.

The Communist Party's right to qualify as a new political party and to gain access to the Indiana ballot is a right indisputably protected by the First Amendment, as is the correlative right of Appellant candidates.

> [T]he right of individuals to associate for the advancement of political beliefs, and the right of qualified voters, regardless of their political persuasion, to cast their votes effectively . . . rank among our most precious freedoms . . . The right to form a party for the advancement of political goals means little if a party can be kept off the election ballot and thus denied an equal opportunity to win votes. *Williams* v. *Rhodes,* 393 U.S. 23, 30, 31 (1968).

The First Amendment's protection of the rights of the individual voter-appellants must also be considered. As this Court has said: " . . . the rights of voters and the rights of candidates do not lend themselves to neat separation; laws that affect candidates always have at least some theoretical, correlative effect on voters." *Bullock* v. *Carter,* 405 U.S. 134, 143 (1972). Clearly, "The right to vote freely for the candidate of one's choice is of the essence of a democratic society, and any restrictions on that right strike at the heart of representative government." *Reynolds* v. *Sims,* 377 U.S. 533, 555 (1964).

A fundamental principle in our democracy is "that the people should choose whom they please to govern them,"

and "this principle is undermined as much by limiting whom the people can select as by limiting the franchise itself." *Powell* v. *McCormack*, 395 U.S. 486, 547 (1969).

The electorate should have the unhampered opportunity to cast their votes at the polls for the widest variety of political programs. The act of casting a ballot is the safeguard and the ultimate expression of all constitutional rights. Access to the ballot is integrally related to the First Amendment rights of speech and assembly; the electoral process is often the only viable forum through which novel ideas can be presented effectively to one's constituency. Any attempts by government to limit this fundamental right must necessarily be counterproductive. To deny access to the ballot to any person believed to advocate forceful overthrow of government, sedition, or treason, for example, not only flies in the face of the First Amendment, it is pragmatically unsound. Emerson, *The System of Freedom of Expression*, p. 202 (1970). Any person who might advocate the use of force to seize power does so not because of his attachment to violence as such but as an instrument to achieve his political objectives. If he believes he can achieve those objectives through use of the electoral process, he is less likely to advocate, no less generate, violence. But the more such a person is shut out of a functioning parliamentary system, the more likely will he resort to force or to its advocacy.

It is clear then that any substantive restriction on the fundamental right of access to the ballot can be justified only by the most compelling state interest. *Dunn* v. *Blumstein*, 405 U.S. 330 (1972). Indeed, the only permissible substantive restrictions in this area would be those necessary to safeguard the electoral process itself. Cf. *United*

States v. *Classic*, 313 U.S. 299 (1941). Exclusion of a party or a candidate because of political ideology can never be permitted. Such exclusion in no way safeguards the electoral process, it undermines it.

Valid state interests concerning officeholders and the proper functioning of government are important, but they are irrelevant to the electoral process itself and cannot justify infringements of constitutional rights in the electoral process. States must carry out their legitimate purposes by methods that are least restrictive of constitutional rights. E.g., *Shelton* v. *Tucker*, 364 U.S. 479, 488 (1960). The inescapable conclusion is that whatever valid interests a state may have in regulating who are to be officeholders may be asserted only at the point of actual office-taking.[5]

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[5] The case of *Gerende* v. *Election Board*, 341 U.S. 56 (1951) (per curiam), is not contrary. This Court in *Whitehill* v. *Elkins*, 389 U.S. 54 (1967), held the Maryland statute involved in both cases impermissibly broad and vague on its face and as construed and applied. It pointed out that in *Gerende* the Court had merely "accepted the narrowing construction tendered by the Attorney General during oral argument *so as to avoid the constitutional issue that was argued.*" 389 U.S. at 58 (emphasis supplied). "That construction had not yet been fashioned into an oath or certificate when *Gerende* reached us." *Id.*, at 58. Hence the *Gerende* decision was an exercise of the avoidance doctrine, not a decision on the merits.

This Court is urged to reconsider *Lisker* v. *Kelley*, 315 F. Supp. 777 (M.D. Pa. 1970), *aff'd mem.* 401 U.S. 928 (1971) (Douglas and Brennan, *JJ.*, dissenting; Black, *J.*, recommending dismissal for mootness). That case upheld the right of a state to impose a candidacy oath for state office. The district court, relying primarily on cases upholding oaths in the employment area, apparently was not faced with the argument that the electoral process is a situation demanding different justification for state imposed restrictions. Further, the district court labored under the misapprehension that in *Whitehill* this Court " . . . recognized the viability of *Gerende* . . . " as a decision sustaining candidates' oaths. 315 F. Supp. at 782. This Court, having accepted jurisdiction to hear this case, should consider all constitutional arguments, including those inconsistent with the result reached in *Lisker*.

This conclusion is reflected in the United States Constitution which prescribes requirements for officeholders, not for candidates. Similarly, the presidential oath to "preserve, protect and defend the Constitution of the United States" is to be taken "Before he enter on the Execution of his Office, . . ." not before he is permitted to become a candidate. Art. II, §1, cl. 8.

The constitutional difference between candidacy and office-taking is supported by long practice which has recognized as valid the nomination and election of Congressmen who at the time of their election did not yet meet the age requirement specified in the Constitution. Joseph R. Biden (Democrat of Delaware) is the Senate's current example of this practice. He turned 30 two weeks after the election. *Congressional Quarterly: Weekly Report*, Nov. 11, 1972, p. 2991. Even more relevant has been the permitting of candidacy of individuals who would not meet the age requirement even at the time of inauguration.[6] Furthermore, for the offices of President and Vice President the Constitution clearly anticipates, and thus provides for, the case where the winning candidate does not meet the qualification for the office. Amend. XX, §3. Cf. *Powell* v. *McCormack*, 395 U.S. 486 (1969), where the Court distinguished between exclusion and expulsion from office.

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[6] The supreme example is that of Rush D. Holt, nominated and elected Senator from West Virginia on November 6, 1934. He did not reach thirty till June 19, 1935, after which date he was permitted to take his rightful seat. A challenge to his seating was defeated 62 to 17. The Senate Report prepared for the occasion describes in detail the historical and legal precedents involved. S. Rep. 904, 74th Cong., 1st Sess. (1935).

III.

The Indiana statute is void because it requires an oath broader than the constitutional oaths of office.

Appellants contend that not even the constitutional oath of office may be imposed on mere candidates and their political parties. However, if an oath can validly condition candidacy, especially federal office candidacy, the oath can be no broader than the one prescribed by the Constitution for the office.[7] So in effect held the Court of Appeals of Maryland in *Shub* v. *Simpson,* 196 Md. 177, 76 A.2d 332, *appeal dismissed,* 340 U.S. 881 (1950), when it ruled that candidates for federal office could not be required to take a state loyalty oath. Time and again courts at all levels have held the requirements enumerated in the Constitution for federal offices are exclusive. Additional requirements imposed by the states beyond those mentioned in the Constitution have been struck down. E.g. *In re O'Connor,* 173 Misc. 419, 17 N.Y.S.2d 758 (Sup. Ct. 1940) (upholding the right of "a leader of the communist party in America" to be on the ballot); *State* v. *Crane,* 65 Wyo. 189 (1948); *State ex rel. Handley* v. *Superior Court of Marion County,* 238 Ind. 421 (1958); *Stack* v. *Adams,* 315 F. Supp. 1295 (three judge court, N.D. Fla. 1970).

In 1807 the House of Representatives voted 89 to 18 to seat William McCreery of Maryland even though he did not satisfy an additional requirement imposed on the office by the State of Maryland. 17 *Annals of Congress* 1237

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[7] *Lisker* v. *Kelley,* 315 F. Supp. 777 (M.D. Pa. 1970), *aff'd mem.* 401 U.S. 928 (1971), clearly has no relevance to this issue as it involved candidates for purely local offices.

(1807). On March 5, 1856 the Senate voted 35 to 8 to seat Lyman Trumbull of Illinois against a challenge that Illinois state law disqualified him from holding the office. The issue was the subject of considerable debate in the Senate. The final vote decisively rejected the idea put forward by a minority that a state could "superadd" qualifications for Senators. *The Congressional Globe,* 34th Cong., 1st Sess., March 3-5, 1856, pp. 547-84 *passim.* This Court has summarized much of this history and lent further force to the proposition that only expressly prescribed Constitutional requirements may be imposed for federal offices in its opinion in *Powell* v. *McCormack,* 395 U.S. 486 (1969).

The oath which the office taker swears is one of the enumerated qualifications for the office. *Shub* v. *Simpson,* 196 Md. 177, 76 A.2d 332, *appeal dismissed,* 340 U.S. 881 (1950). Thus it is in the same position as the other enumerated qualifications, and is pre-emptive as to any other oaths. In the case of the office of President, the Constitution specifies the words required. Art. II, §1, cl. 8. The other office holders, federal and state, must swear only "to support this Constitution" although the words of the oath are not specified. Art. VI, cl. 3. Congress, however, recognized that the duty of providing the words of the oath lay upon its shoulders and specified them for federal officers in its first public act. An Act to regulate the Time and Manner of administering certain Oaths, 1 Stat. 23, June 1, 1789.

Various provisions in the Constitution have been construed to confine exclusive authority on certain subjects to the federal government, even in the absence of specific language. Thus Congress' power over naturalization,[8]

[8] *City of Minneapolis* v. *Reum,* 56 F. 576 (8th Cir. 1893).

bankruptcy,[9] patents and trademarks,[10] coinage,[11] post offices and post roads,[12] to name a few, are exclusive. Similarly Art. II, §1, cl. 8 and Art. VI, cl. 3 of the Constitution confer exclusive jurisdiction in the federal government to prescribe oaths for federal officers; they also preclude the states from imposing oaths as conditions to candidacy. Present exercise of this authority by Congress is exemplified by 2 U.S.C. §§21, *et seq.* Congress' action might well be taken to have "occupied the field" thereby pre-empting any further State regulation. Cf. *Pennsylvania* v. *Nelson,* 350 U.S. 497 (1956); *Uphaus* v. *Wyman,* 360 U.S. 72 (1959).

As the states have no right to add or subtract from the enumerated qualifications for office, so too the states have neither the right to add to nor subtract from the words of the oaths specifically called for in the Constitution. There is nothing in *Cole* v. *Richardson,* 405 U.S. 676 (1972) (involving a so-called "positive oath" in an employment context) to support the idea that the Indiana affidavit is "essentially the same" as the oath required by the Constitution. The Indiana affidavit is a negative oath and deals with advocacy; it cannot be equated with an affirmative and simple oath to "uphold and defend" the Constitution. Not after *Cramp* v. *Board of Public Instruction,* 368 U.S. 278 (1961) has this Court sustained any such negative oath. The Indiana affidavit clearly requires an additional oath, and as Chief Justice Vanderbilt of the New Jersey Supreme Court held in reference to the New Jersey Constitu-

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[9] *International Shoe Co.* v. *Pinkus,* 278 U.S. 261 (1929).

[10] *Sears, Roebuck & Co.* v. *Stiffel Co.,* 376 U.S. 225 (1964).

[11] *Legal Tender Cases,* 79 U.S. 457 (1871).

[12] *Hoover* v. *McChesny,* 81 F. 472 (Cir. Ct. Kentucky 1897).

tion, there is nothing in the United States Constitution's history or text

> that lends countenance to the idea that the Legislature was authorized to impose oaths in addition to those set forth in the Constitution on the classes of public officials covered thereby. *Imbrie* v. *Marsh*, 3 N.J. 578, 592, 71 A.2d 352, 360 (1950).

At the very least the Constitution requires Ind. Ann. Stat. §29-3812 to make a distinction between federal and non-federal political offices. Of course, no such distinction is made in the statute; it clearly applies across the board. The constitutional infirmity, just as clearly, cannot be remedied by "interpreting" the affidavit as valid only for state and local offices. The affidavit is demanded of the party itself, not of its individual candidates. Requiring a party to file such an affidavit if it intends to field candidates for local office would only be a less direct method of exercising impermissible control over the party's candidates for federal offices. This Court cannot "rewrite" the Indiana statute to make it applicable to individual candidates, cf. *Aptheker* v. *Secretary of State*, 378 U.S. 500, 515 (1964).

IV.

The Indiana statute is unconstitutionally broad and vague in violation of the First and Fourteenth Amendments.

A. *The Indiana Statute Is Unconstitutionally Vague*

The appellants originally attacked the Indiana statute as being unconstitutionally vague. A portion of the statute has already been declared unconstitutional as vague and overbroad. *Whitcomb* v. *Communist Party*, 36 L. Ed.2d 173 (1973). The remaining part requires an affidavit from a political party " . . . that it does not advocate the overthrow of local, state or national government by force or violence . . . " Ind. Ann. Stat. §29-3812.

As the statute is formulated, a new political party finds itself in the classical dilemma of not knowing which of its acts or utterances are forbidden. Against what sort of advocacy is the statute directed? Does one violate the law when he or she speculates in abstract terms about the most hypothetical of cases, or teaches the moral necessity of violent overthrow? At the other end of the spectrum is speech intended to incite immediate violent action against legitimate government. At what point between these two extremes does the statute come into play? As this Court said in *Baggett* v. *Bullitt*, 377 U.S. 360, 372 (1964):

> We are dealing with indefinite statutes whose terms, even narrowly construed, abut upon sensitive areas of basic First Amendment freedoms. The uncertain meanings of the oaths require the oath-taker—teachers and public servants—to "steer far wider of the unlawful

> zone," *Speiser* v. *Randall,* 357 U.S. 513, 526, than if the boundaries of the forbidden areas were clearly marked.

See also *Smith* v. *California,* 361 U.S. 147, 151 (1959); *Cramp* v. *Board of Public Instruction,* 368 U.S. 278 (1961).

The dangers inherent in such laws are even greater in this area involving rights of free speech and political organization.

The due process requirement of statutory clarity in this First Amendment area was clearly not met by the ambiguous words of Ind. Ann. Stat. §29-3812, and this was a basis for the Communist Party's original challenge. On its face the statute may still be attacked for impermissible vagueness and appellants do not mean to abandon this argument. As a result of this litigation, however, the statute in question has been better defined. Its vagueness is now clearly overshadowed by its unconstitutional overbreadth.

B. *The Indiana Statute Unconstitutionally Proscribes Advocacy Not Directed to Inciting or Producing Imminent Lawless Action.*

A law is overbroad when, in addition to proscribing acts "which legitimately may be proscribed," it proscribes acts "which may not be proscribed." *Keyishian* v. *Board of Regents,* 385 U.S. 589, 609 (1967). The overbreadth restrictions of the First Amendment and the due process clause also require the states to carry out their legitimate purposes by methods least restrictive of constitutional rights:

> . . . [E]ven though the governmental purpose be legitimate and substantial, that purpose cannot be pursued

> by means that broadly stifle fundamental personal liberties when the end can be more narrowly achieved. The breadth of legislative abridgment must be viewed in the light of less drastic means for achieving the same basic purpose. *Shelton* v. *Tucker,* 364 U.S. 479, 488 (1960).

It is in this light that the Indiana statute must be examined.

We must turn to Indiana sources to determine what the advocacy provision encompasses. That the statute as a whole was meant to have extremely broad scope is indicated by the decision of the Indiana Supreme Court in *State ex rel. Socialist Labor Party* v. *State Election Board,* 251 Ind. 260, 241 N.E.2d 69 (1968). See also Indiana Attorney General Official Opinion No. 11, J.S. pp. 9a-19a ("The Indiana law . . . clearly prohibits placing on the ballot any so-called political party or organization which advocates the overthrow of the government . . . " *Id.* at 18a).

Insight into Ind. Ann. Stat. §29-3812 can also be gained from an overview of legislation in related areas. Indiana has traditionally used a broad brush in dealing with problems of "Criminal Syndicalism" (chapter 13 of the Penal Code, §10-1301 *et seq.*) and "Communism" (chapter 52 of the Penal Code, §10-5201 *et seq.*), e.g. §10-5202 "Public Policy—Extermination of Communism"; §10-5204 "Membership in Communist Party or similar organization unlawful." See also *State* v. *Levitt,* 246 Ind. 275, 203 N.E.2d 821 (1965), upholding the constitutionality of §10-5205, "Unlawful assembly" for the purpose of "advocating or teaching the doctrine" of forcible overthrow of government.

The history of this litigation demonstrates that the statute is patently overbroad. On the day after the dis-

trict court's decision sustaining the portion of the statute in question here, the Communist Party filed its affidavit that it

> does not advocate the overthrow of local, state or national government by force or violence. The term advocate as used herein has the meaning given it by the Supreme Court of the United States in *Yates* v. *United States,* 354 U.S. 298 at 320, "the advocacy and teaching of concrete action for the forcible overthrow of the government, and not of principles divorced from action." (J.S. p. 8a.)

The Indiana State Election Board rejected the affidavit at a hearing that same day and expressed the view that the term "advocate," as used in Ind. Ann. Stat. §29-3812, includes the advocacy and teaching of abstract ideas, beliefs, and principles divorced from action.

On October 4, 1972 the district court denied the Communist Party's "Petition for Mandate to Enforce the Prior Order of the Court." Thereafter the Communist Party filed a "Motion to Amend," requesting the District Court to declare

> that the portion of Ind. Ann. Stat. §29-3812 providing "that it [the certifying party] does not advocate the overthrow of local, state or national government by force or violence" is constitutional only insofar as it proscribes advocacy directed at promoting unlawful action, as distinguished from advocacy of abstract doctrine. (App. p. 36a)

In denying the motion on October 31, 1972, the district court in effect reaffirmed that Indiana did not intend its

statute to be read narrowly. Because the statute has such wide scope it is unconstitutionally overbroad.

This Court has had frequent occasion in the past to specify what kind of advocacy is subject to governmental restriction. What has emerged is now quite clear. Only advocacy that is " . . . directed to inciting or producing imminent lawless action and is likely to incite or produce such action . . . " may be prohibited. *Brandenburg* v. *Ohio*, 395 U.S. 444, 447 (1969). See also, *Yates* v. *United States*, 354 U.S. 298, 320 (1957); *Noto* v. *United States*, 367 U.S. 290, 297-8 (1961); *Street* v. *New York*, 394 U.S. 576 (1969).

The principle of the decisions precluding criminal prosecution for engaging in advocacy not imminently inciting lawless conduct precludes the conditioning of statutory rights on overly broad loyalty oaths. E.g. *Cole* v. *Richardson*, 405 U.S. 676 (1972); *Keyishian* v. *Board of Regents*, 385 U.S. 589 (1967). See generally, *Baird* v. *State Bar of Arizona*, 401 U.S. 1, 6 (1971).[13] If a state cannot impose greater restrictions on the First Amendment rights of its legislators than it can on private citizens, *Bond* v. *Floyd*, 385 U.S. 116, 132-3 (1966), it certainly cannot impose such greater restrictions on mere candidates for public office.[14] Appellees have shown nothing inherent in the

[13] Of course the meaningful threat of perjury prosecution made by the Indiana Attorney General may well render moot any possible question of a difference in standards in civil and criminal deprivations. (See J.S., p. 19a.) This Court is expressly conscious of the risks of perjury prosecution in the loyalty oath context. *Baggett* v. *Bullitt*, 377 U.S. 360, 374 (1964); *Cramp* v. *Board of Public Instruction*, 368 U.S. 278, 286-87 (1961).

[14] The Court's observation that "a State may constitutionally require an oath to support the Constitution from its legislators which it does not require of its private citizens" (385 U.S. at 135), obviously cannot be taken as a mandate to permit an oath that

electoral process that justifies any restrictions on the participants greater than those permitted on citizens at large. Indeed the electoral situation is one which demands the utmost protection of First Amendment rights of advocacy and merits greatest latitude in determining what is permissible speech.

This Court must accept the repeated Indiana determination of the broad scope of the Indiana statute, cf. *Cramp* v. *Board of Public Instruction,* 368 U.S. 278, 285 (1961). The law cannot be saved by giving it a different meaning than the one intended, and the one intended is clearly unconstitutionally overbroad. As Professor Thomas I. Emerson has written:

> Qualifications for access to the ballot grounded upon conduct otherwise protected as expression would seem to present the clearest possible case for application of the full protection rule [of the First Amendment]. It is difficult to see how the social interest in internal security is served by exclusion of a political party from the political process. *The System of Freedom of Expression,* 202 (1970).

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invades First Amendment provinces or indeed one that exceeds the constitutional support oath. It means only that citizens cannot be compelled willy-nilly to execute support oaths.

V.

The Communist Control Act of 1954 is neither applicable to this case nor constitutional.

At several points in this case the issue of the applicability of the Communist Control Act of 1954, 50 U.S.C. §§841 and 842, has been raised. (E.g., App. pp. 24a-25a.)[15] The Act was not specified as one of the grounds relied upon by the Indiana Election Board in denying a place on the ballot to the Communist Party, and it was neither relied upon nor mentioned by the district court in its decision. The appellants continue in their belief that the Communist Control Act has no bearing on this case. Reference to the Act in the appellees' "Motion to Dismiss or Affirm" (p. 8), however, warrants this reply.

This Court has never passed on the constitutionality of the Act, yet unmistakable signs from decisions of other courts point to the Act's unconstitutionality. See *Mitchell* v. *Donovan,* 290 F. Supp. 642, 645 (D. Minn. 1968) (3-judge court) (expressing "grave doubts which exist as to the constitutionality of the Communist Control Act"), 300 F. Supp. 1145 (D. Minn. 1969), *vacated* (for reasons not here relevant) 398 U.S. 427 (1970). The Act has recently been declared unconstitutional by a district court in *Blawis* v.

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[15] The statute reads in part:

> The Communist Party of the United States, or any successors of such party regardless of the assumed name, whose object or purpose is to overthrow the Government of the United States, or the government of any State . . . by force and violence, are not entitled to any of the rights, privileges, and immunities attendant upon legal bodies created under the jurisdiction of the laws of the United States or any political subdivision thereof . . . 50 U.S.C. §842.

Bolin, 41 L.W. 2617 (D. Ariz. May 8, 1973), another case of a state's efforts to keep the Communist Party off the ballot. The Act was declared to be a Bill of Attainder and violative of the Due Process and Equal Protection clauses of the Fourteenth Amendment. In *Communist Party* v. *Catherwood*, 367 U.S. 389 (1961), the only decision of this Court dealing with the Act, the Court commented on the vagueness of the law and refused to apply it to the facts of the case. And numerous decisions of this Court have struck down as unconstitutional similar laws not making the crucial distinction between active and non-active membership. E.g., *United States* v. *Robel*, 389 U.S. 258 (1967); *Aptheker* v. *Secretary of State*, 378 U.S. 500 (1964). Thus even if this Court finds the Act is applicable to the case at bar, the unconstitutionality of the Act precludes its use to restrict any of the rights of the appellants at issue here.

CONCLUSION

For the reasons stated above, the Court should reverse that portion of the District Court opinion upholding the constitutionality of part of the Indiana affidavit requirement.

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